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COURT OF CRIMINAL APPEALS
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No. PD-1299-18
In the
Texas Court of Criminal Appeals
At Austin

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COURT OF CRIMINAL APPEALS
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No. 14-17-00005-CR
In the
Court of Appeals for the
Fourteenth District of Texas
At Houston

No. 2112570
In County Criminal Court at Law No. 8
Of Harris County, Texas

LESLEY DIAMOND
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT PERMITTED

STATEMENT REGARDING ORAL ARGUMENT

This Court did not permit oral argument in this case.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 68.4(a), a complete list of the names of all interested parties is provided below.

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Trial & Habeas Judge:

Honorable Jay Karahan

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

Appellant was charged by information with driving while intoxicated. (CR – 31, CR Supp. 23)[1] The information included an allegation that her blood-alcohol level was at or above 0.15. (CR Supp. 23) On May 1, 2014, a jury convicted appellant and the trial court sentenced her to five days in jail and a $2,000 fine. She did not appeal her conviction. (CR – 32)

In 2016, appellant filed an application for writ of habeas corpus alleging that the State failed to disclose favorable, material impeachment evidence regarding the blood analyst, in violation of her right to due process. (CR – 4) After an evidentiary hearing, the habeas court denied the writ application. In a single issue on appeal, appellant argued that the habeas court erred in denying the writ application.

A majority of a panel of the Fourteenth Court of Appeals reversed the trial court's denial of appellant's writ application, granted habeas relief, and remanded the case for further proceedings.[2] *Diamond v. State*, 561 S.W.3d 288 (Tex. App.—

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[1] "CR" refers to the clerk's record filed in the court of appeals on January 11, 2017. "CR Supp.," "CR Supp. II," and "CR Supp. III" refer to the first, second, and third supplemental clerk's records, filed in the court of appeals on February 17, 2017, August 1, 2017, and June 14, 2018, respectively.

[2] The lower appellate court initially affirmed the trial court's denial of the writ application on May 3, 2018. *Diamond v. State*, No. 14-17-00005-CR, 2018 WL 2050392 (Tex. App.—Houston [14th Dist.] May 3, 2018), *opinion withdrawn and superseded by Diamond v. State*, No. 14-17-00005-CR, 2018 WL 4326441 (Tex. App.—Houston [14th Dist.] Sept. 11, 2018) (op. on reh'g). On May 21, 2018, the trial court granted appellant's motion to enter a judgment nunc pro tunc, which changed the degree of appellant's offense from a Class B misdemeanor to a Class A

Houston [14th Dist.] Oct. 23, 2018, pet. granted) (substitute op.). A substitute dissenting opinion was also published. *Id.* (Donovan, J., substitute dissenting op.).

This Court granted review on whether the Fourteenth Court majority failed to apply the standard of review correctly in conducting its *Brady* analysis.

ISSUE PRESENTED

Did the court of appeals fail to apply the standard of review correctly in conducting its *Brady* analysis?

STATEMENT OF FACTS

A. Appellant's trial

Before trial, the State filed disclosures of experts, including Houston Forensic Science Center (HFSC) analyst Andrea Gooden and her supervisor, William Arnold. (CR Supp. 26-30) On April 28, 2014, appellant filed a motion for production of evidence favorable to the accused, which was granted by the trial court. (CR Supp. 31-33) The State made no disclosures. (RRV – 102-105, 128)

At trial, Precinct 5 Deputy Bounds testified that he was conducting a traffic stop on a tollway when he saw appellant speeding in the lane closest to him and make several unsafe lane changes. (RRV – 143-49, 159-60) Bounds testified that appellant exhibited several signs of intoxication, she admitted to drinking three

misdemeanor. (CR Supp. III – 18-23) In its substitute opinion, the majority also set aside the nunc pro tunc judgment of conviction.

beers, and she had one open beer can and two closed beer cans in her vehicle. (RRV – 153-59, 254)

Deputy Francis assisted in Bounds's investigation. (RRV – 158-59) Bounds observed Francis administer the walk-and-turn and one-leg-stand tests to appellant.[3] (RRV – 239) Bounds saw appellant exhibit five clues on the walk-and-turn test, and four clues on the one-leg-stand test. (RRV – 250, 252) Appellant's blood was drawn pursuant to a search warrant. (RRV – 261-264, 395-96) Gooden analyzed the blood and testified that appellant's blood alcohol concentration (BAC) was 0.193. (RRV – 454)

B. Appellant's writ hearing

In 2016, appellant filed an application for writ of habeas corpus alleging that the State suppressed favorable impeachment evidence in violation of her right to due process. (CR – 4-18) Specifically, she claimed that the State suppressed evidence that, prior to trial: (1) Gooden certified a lab report in an unrelated case with the incorrect defendant's name; and (2) Arnold removed her from her casework because of the erroneous report, concerns about Gooden's ability to testify, and concerns about her knowledge base. (CR – 10-16) Appellant claimed the information would have resulted in an acquittal or a deadlocked jury. (CR – 16-17)

[3] Deputy Francis was prohibited from testifying as a result of a violation of Texas Rule of Evidence 614. (RRV – 185-86)

The trial court conducted a writ hearing in which Gooden, Arnold, the trial prosecutor, and general counsel for the Harris County District Attorney's Office testified. (RRII) Exhibits at the hearing included appellant's information and judgment, portions of the trial transcript, a report from the Texas Forensic Science Commission (TFSC Report), and the City of Houston Officer of Inspector General Report (OIG Report). (AX 1-2, 8, 9)[4] The trial court denied appellant's writ application. (CR – 31, 48; RRIV – 5) In its findings, the trial court summarized facts developed at trial, after trial, and at the writ hearing. (CR – 38-43) The relevant timeline was developed as follows:

- October 5, 2013: A Houston police officer submitted a blood sample with the wrong incident number, but the correct name on the vial labels.[5] (CR – 38) The officer was subsequently contacted multiple times by another analyst to provide a correct submission form. (CR – 38)

- December 9, 2013: Pursuant to common lab practice for minor discrepancies, Gooden analyzed the blood evidence and set it aside. (CR – 38)

- January 10, 2014: Gooden signed the certificate of analysis for the mislabeled blood. (CR – 38) Arnold reviewed and approved the erroneous report, which was released into the report system. (CR – 38)

- April 15, 2014: Gooden discovered that the erroneous report had been released and immediately informed supervisors about the error. (CR – 39) Arnold determined that no one had accessed the report. (CR – 39)

[4] "AX" refers to appellant's exhibits included with her writ application.

[5] The OIG report states more specifically that the officer submitted an evidence envelope barcoded with a particular incident number, and listing the suspect's name as Suspect 1. However, inside the envelope were two vials of blood labeled with Suspect 1's name but included a different incident number. (RRV – 28) The incident number on the submission form belonged to Suspect 2, who did not give a blood sample. As a result, the lab report for Suspect 1's blood analysis results was labeled erroneously as belonging to Suspect 2. (RRV – 29-30)

- April 16, 2014: Arnold advised Gooden that she was being removed from casework in order to focus solely on documenting the issues surrounding the unrelated mislabeled blood case. (CR – 39, 42)

- April 29-30, 2014: Gooden testified in appellant's trial. (CR – 37)

- May 2014: Gooden spoke with Arnold about returning to casework and was told that her removal was due to her trial testimony. (CR – 39)

- June 3, 2014: Gooden contacted the American Society of Crime Lab Directors (ASCLD) regarding her removal from casework, her concern that the erroneous lab report had not been corrected, and the failure to notify the District Attorney's Office. (CR – 39)

- June 4, 2014: Gooden reported the certification of the erroneous report to TFSC. (CR – 39)

- June 26, 2014: Arnold provided Gooden with a written evaluation of her courtroom testimony from appellant's trial. (CR – 42)

- July 28, 2014, Arnold informed Gooden that she was released to return to casework. (CR – 40)

- August 4, 2014: Arnold issued a memo regarding Gooden's return to casework. (CR – 43) In the memo, he stated that he began to question Gooden's knowledge base in early April, 2014, after he reviewed a PowerPoint presentation she prepared for a pending trial. (CR – 43) The memo stated that Arnold had the opportunity to review Gooden's analytical work after January 1, 2014, and that his technical reviews had not caused him any particular concern. (CR – 43) Arnold stated in the August 4 memo that the erroneous report certification coupled with his previous observations led to Gooden's "suspension from casework."[6] (CR – 43)

- January 2015: TFSC issued a report that (1) did not identify any professional misconduct by Gooden; (2) concluded that Arnold was professionally negligent for failing to issue timely amended reports to the District Attorney's

[6] Gooden acknowledged receipt of the memo but did not agree with all the contents. (CR – 43)

> Office once Gooden identified the mistake in the report names in the unrelated case; (3) found Arnold and the HFSC Quality Manager professionally negligent for failing to issue a timely Corrective and Preventative Action Report; (4) concluded that Arnold provided inconsistent explanations regarding why Gooden was removed from casework; (5) found that Arnold's August 4 memo contradicted representations made to TFSC that the error in the blood alcohol report certification was independent from other reasons Gooden was removed from casework; (6) found that Arnold's representation that Gooden was removed from casework for concerns regarding testimony independent from the erroneous lab report case did not comport with the timeline of facts; and (7) Gooden's colleagues and the previous manager described Gooden as hardworking, dedicated, and technically competent. (CR – 40-41) The habeas court found that TFSC did not find that Gooden was professionally negligent. (CR – 42)

The habeas court found that appellant did not demonstrate that the undisclosed information was favorable or material. (CR – 44-47) The court also found that, had the State disclosed the information, the evidence would not have been relevant or admissible in appellant's trial. (CR – 45-46)

SUMMARY OF THE ARGUMENT

The majority failed to give proper deference to the habeas court's fact findings regarding why Gooden was removed from casework. This failure led to erroneous conclusions about the admissibility and favorability of the undisclosed evidence. This failure, coupled with the majority's failure to consider the undisclosed evidence in light of all of the evidence, also led to an erroneous materiality determination.

Alternatively, even if this Court finds that the majority properly considered evidence of Arnold's purported concerns about Gooden's knowledge base or ability

to answer questions, the majority's materiality determination is still incorrect due to the failure to consider the undisclosed evidence in light of all of the evidence.

ARGUMENT

I. The majority reached the wrong conclusions in its *Brady* analysis because it failed to apply the standard of review correctly.

A. Applicable Law and Standard of Review

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The duty to disclose evidence applies even if there has been no request by a defendant, and the duty to disclose encompasses both impeachment and exculpatory evidence. *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006).

To establish a claim under *Brady*, a habeas applicant must demonstrate that: (1) the State failed to disclose evidence; (2) the withheld evidence is favorable to him; and (3) the evidence is material. *Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). The applicant must prove the constitutional violation and his entitlement to habeas relief by a preponderance of the evidence. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002).

An appellate court evaluating a trial court's ruling on a habeas claim must review the record evidence in the light most favorable to the trial court's ruling and must uphold that ruling absent an abuse of discretion. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). Reviewing courts, including this Court, should afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). The trial court may accept or reject any or all of any witness's testimony. *Id.* at 819 n.68. Reviewing courts also afford the same level of deference to a trial court's ruling on application-of-law-to-fact questions if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Id*. But appellate courts review *de novo* those mixed questions of law and fact that do not depend upon credibility and demeanor. *Id*. Reviewing courts should also grant deference to implicit factual findings that support the trial court's ultimate ruling, but they cannot do so if they are unable to determine from the record what the trial court's implied factual findings are. *Id*.

B. The majority should not have considered Arnold's purported concerns about Gooden's knowledge base or her ability to answer questions because the habeas court disbelieved that evidence.

In its favorability analysis, the majority stated, "the evidence is undisputed in the habeas record that the State did not disclose that Gooden had been suspended or temporarily removed from her casework or that Arnold lacked confidence in Gooden's understanding of the basic science." *Diamond*, 561 S.W.3d at 294. The majority further stated that the habeas court made no findings regarding evidence of "Arnold's lack of confidence in Gooden's understanding of the basic concepts underlying the performance of her duties." *Id.* at 295. This assertion is wrong.

In its findings of fact, the habeas court stated:

> Applicant does not demonstrate the favorability of information regarding Gooden's work status when she testified in Applicant's trial. *When Gooden testified in Applicant's trial, she had been simply removed from casework to focus solely on documenting issues surrounding an unrelated mislabeled blood case . . . .*

(CR – 45) (emphasis added).

This express finding illustrates the habeas court's disbelief of Arnold's testimony that he removed Gooden from casework due to concerns about her knowledge base or her ability to answer questions. *See Peterson*, 117 S.W.3d at 819 n.68 (trial court may accept or reject any or all of any witness's testimony). The dissent recognized as much:

> In her reply brief, appellant attacks the trial court's finding that Gooden's removal or suspension was for the purpose of documenting the [erroneous report] error. But the trial court expressly found the claim of Gooden's supervisor, William Arnold, that it was for another reason was not credible in light of the surrounding circumstances.

Diamond, 561 S.W.3d at 303 (Donovan, J., dissenting).[7] The dissent also recognized that "[t]he evidence in question is (1) Gooden's certification of the [erroneous] report when it contained a labeling error; and (2) Gooden's removal or suspension from performing her regular job duties before she testified at appellant's trial." *Id.* at 300.

Even if this finding is not considered by this Court to be express disbelief of Arnold's purported reasons for removing Gooden from casework, that same finding is implicit and apparent from the trial court's findings. *See Peterson*, 117 S.W.3d at 819 (reviewing courts should grant deference to implicit factual findings that support the trial court's ultimate ruling if they are able to determine what the implied findings are from the record); *cf. Ex parte Wheeler*, 203 S.W.3d 317, 325-26 (Tex. Crim. App. 2006) ("reviewing courts defer to the trial court's implied factual findings that are supported by the record").

The habeas court, in discussing favorability, addressed only the certification of the erroneous report, and Gooden's removal from casework. (CR – 44-46) The habeas court also included in its findings the TFSC's conclusions that: (1) Arnold provided inconsistent explanations regarding why Gooden was removed from

[7] The dissent addressed only materiality. *Diamond*, 561 S.W.3d at 299-300.

casework; (2) his August 4 memorandum contradicted representations made to TFSC that the error in the erroneous report certification was independent from other reasons Gooden was removed from casework; (3) Arnold's representation that Gooden was removed from casework for concerns regarding testimony independent from the case with the name error did not comport with the timeline of facts; (4) Gooden's colleagues (including those who assisted with her training) and the previous manager described Gooden as hardworking, dedicated, and technically competent; and (5) every current and former analyst with knowledge of the case that TFSC interviewed expressed the opinion that Gooden was unfairly blamed for the reporting error in the unrelated case. (CR – 40-42) The habeas findings also noted that Arnold's August 4 memo was composed after Gooden contacted ASCLD, self-disclosed to the TFSC, and communicated with the HFSC Human Resources Director about returning to work. (CR – 43) The habeas court found that TFSC did not find Gooden professionally negligent. (CR – 42)

These findings reflect the habeas court's disbelief of Arnold's assertion that he removed Gooden from casework due to concerns about her knowledge base or her ability to answer basic questions. That Arnold did not immediately put Gooden back on casework after Gooden documented the erroneous-report incident does not mandate the conclusion that she was removed from casework for some other reason. As Gooden explained at the writ hearing, she submitted the explanatory memo on

April 17, 2014, and was told by Arnold that she could not do casework until the memo had been reviewed by Arnold and others "up the chain." (RRII – 49, 54-58)[8]

As an issue of historical fact dependent on an evaluation of credibility and demeanor, and supported by the record, the appellate court should have deferred to the habeas court's finding that Gooden was removed from casework solely to document the circumstances of the mislabeled lab report. *See Peterson*, 117 S.W.3d at 819. While the majority failed to acknowledge this standard, the dissent adhered to it, stating "[w]e are obligated to defer to the trial court's assessment of Arnold's credibility because the trial court heard his testimony while we must rely on the cold record." *Diamond*, 561 S.W.3d at 303 (Donovan, J., dissenting).

Therefore, the only undisclosed evidence that the majority should have considered is (1) Gooden's certification of the erroneous lab report, and (2) her removal from casework to document that incident. The majority's failure to properly limit the scope of undisclosed evidence at issue in this case led to erroneous analyses and conclusions on admissibility, favorability, and materiality.

[8] Before her testimony in appellant's trial on April 29, 2014, Gooden was out of town from April 23-27, 2014, and was "getting ready to go to New York," on April 18, 2014, which the habeas court noted fell on a Friday. (RRII – 55-58)

C. The majority's failure to give proper deference to the habeas court's fact findings contributed to its erroneous admissibility assessment.

The State does not have a duty to disclose favorable, material evidence if it would be inadmissible in court. *Miles*, 359 S.W.3d at 669.[9] A habeas applicant must show that the evidence would have been admissible at trial. *Id*. In addressing admissibility, the majority disagreed with the habeas court's finding that "the undisclosed evidence is not relevant," and stated that "the undisclosed evidence is relevant because it can be used for impeachment of Gooden's qualifications and the reliability of her opinion." (CR – 44-45) *Diamond*, 561 S.W.3d at 295. However, the undisclosed evidence is neither relevant nor proper impeachment.

1. The evidence is not relevant.

A witness may be cross-examined on any relevant matter, including credibility. TEX. R. EVID. 611(b). Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. TEX. R. EVID. 401. Irrelevant evidence is not admissible. TEX. R. EVID. 402. Evidence does not need to prove or

[9] This Court noted the Fifth Circuit's holdings that, if inadmissible evidence would give rise to the discovery of other admissible evidence or witnesses, the State does have a duty to disclose that evidence. *Miles*, 359 S.W.3d at 669 n.22 (citing *United States v. Brown*, 650 F.3d 581, 588 (5th Cir. 2011); *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004); *Sellers v. Estelle*, 651 F.2d 1074, 1077 n.6 (5th Cir. 1981)). However, the evidence of Gooden's certification of the erroneous lab report and her removal from casework to document that incident does not invoke this exception.

disprove a particular fact by itself to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving a fact of consequence. *Gonzalez v. State*, 544 S.W.3d 363, 371 (Tex. Crim. App. 2018). However, it is important, when determining whether evidence is relevant, that courts examine the purpose for which the evidence is being introduced. *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009). As this Court has stated, "[i]t is critical that there is a direct or logical connection between the actual evidence and the proposition sought to be proved." *Id*.

In its materiality analysis, the dissent correctly recognized that:

> [t]here is no logical connection between the undisclosed evidence—that Gooden certified a report in another case that contained a labeling error by the officer or was removed or suspended from her regular job duties to provide documentation regarding that error—and the testimony describing appellant's intoxicated state or the accuracy of the blood test results.

Diamond, 561 S.W.3d at 303 (Donovan, J., dissenting). This undisclosed evidence has no tendency to make any fact of consequence, including Gooden's credibility, more or less probable than it would be without the evidence. The evidence has no relation to Gooden's qualifications to perform blood-alcohol analysis, or whether the analysis in appellant's case—which did not involve a name discrepancy like the erroneous report did—was done correctly. Therefore, the undisclosed evidence is irrelevant. TEX. R. EVID. 401, 402.

2. The evidence cannot be used for impeachment.

Any party may attack a witness's credibility. TEX. R. EVID. 607. Impeachment evidence is that which disputes, disparages, denies, or contradicts other evidence. *Pena v. State*, 353 S.W.3d 797, 811 (Tex. Crim. App. 2011); *see Harm*, 183 S.W.3d at 408. However, courts generally prohibit a party from using extrinsic evidence to impeach a witness on a collateral issue. *Hayden v. State*, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009); *Ramirez v. State*, 802 S.W.2d 674, 675 (Tex. Crim. App. 1990). An issue is collateral if, beyond its impeachment value, a party would not be entitled to prove it as a part of his case tending to establish his plea. *Hayden*, 296 S.W.3d at 554. Unless the witness's testimony created a false impression that is directly relevant to the offense charged, allowing a party to delve into the issue beyond the limits of cross-examination wastes time and confuses the issues. *Id*.

As discussed above, the erroneous lab report and Gooden's removal from casework to document the error, is irrelevant and, therefore inadmissible. Thus, appellant would not have been entitled to prove the evidence as part of her case, rendering the evidence a collateral matter about which appellant would not have been allowed to impeach Gooden at trial. *See id*.

Moreover, the undisclosed evidence does not dispute, disparage, deny, or contradict the evidence that (1) Gooden is qualified to conduct blood-alcohol

analyses, or (2) the analysis in appellant's case was performed correctly. *Cf. Taylor v. Shields*, 744 F. App'x 83, 88-89 (3rd Cir. 2018) (not selected for publication) (finding that evidence of the circumstances surrounding expert's departure from medical examiner's office had no bearing on his quality for truthfulness; stating that the evidence was relevant not to his qualifications as a forensic medical expert, but, as the magistrate judge found, to his administrative responsibilities, which was not relevant to his expertise in the case). The dissent recognized as much, stating that, given the habeas court's unchallenged fact findings regarding the blood evidence in appellant's case, the undisclosed evidence "would not impeach the evidence that appellant's blood was analyzed and had a BAC level of .193." *Diamond*, 561 S.W.3d at 304 (Donovan, J., dissenting).

Therefore, the majority's conclusion that the undisclosed evidence could be used to impeach Gooden is incorrect.

D. The majority's favorability analysis is incorrect.

Favorable evidence is any evidence that, if disclosed and used effectively, may make a difference between conviction and acquittal and includes both exculpatory and impeachment evidence. *Harm*, 183 S.W.3d at 408.

The majority found the following to be favorable impeachment evidence: (1) Gooden's work status at the time of appellant's trial; (2) the certification of the mislabeled lab report in another case; and (3) Arnold's purported concerns "about

Gooden's level of knowledge and understanding regarding her 'knowledge base' and her inability to answer 'basic questions.'" *Diamond*, 561 S.W.3d at 296. The majority concluded that, if this evidence had been disclosed and used effectively for impeachment, it might have made the difference between appellant's conviction and a possible verdict of acquittal. *Id*.

As addressed above, the majority erred by considering Arnold's purported concerns in its favorability analysis because the habeas court disbelieved that evidence. (CR – 40-46) Also, evidence of Gooden's certification of the erroneous lab report and her removal from casework to document the incident is not permissible impeachment evidence. *See Pena*, 353 S.W.3d at 811; *Hayden*, 296 S.W.3d at 554. Therefore, appellant failed to show that this evidence may have made the difference between conviction and acquittal.

The majority further claimed that, regardless of its admissibility, the evidence could have been used in moving under Rule of Evidence 702 to exclude Gooden's expert testimony entirely based on lack of qualifications or reliability. *Diamond*, 561 S.W.3d at 295. That rule states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue.

TEX. R. EVID. 702.

A trial court's responsibility under Rule 702 is to determine whether proffered scientific evidence is sufficiently reliable and relevant to assist the jury. *Jenkins v. State*, 493 S.W.3d 583, 601 (Tex. Crim. App. 2016). The proponent of the scientific evidence bears the burden of demonstrating, by clear and convincing evidence, that the evidence is reliable, by showing: (1) the underlying scientific theory is valid; (2) the technique applying the theory is valid; and (3) the technique was properly applied on the occasion in question. *Id.* at 601-602.

Before admitting expert testimony under Rule 702, the trial court must be satisfied that: (1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the fact-finder in deciding the case. *Rodgers v. State*, 205 S.W.3d 525, 527 (Tex. Crim. App. 2006). Because the possible spectrum of education, skill, and training is so wide, a trial court has great discretion in determining whether a witness possesses sufficient qualifications to assist the jury as an expert on a specific topic in a particular case. *Id.* at 527-28.

The only way that appellant's use of the undisclosed evidence in a Rule 702 hearing could have made a difference between conviction and acquittal is if it could have led the trial judge to (1) exclude Gooden's testimony about appellant's blood-analysis results, or (2) exclude Gooden's testimony entirely. Even if evidence of the

erroneous lab report and Gooden's removal from casework had been used effectively in a Rule 702 hearing, it could not have led to exclusion of appellant's test results or of Gooden's entire testimony. This is further supported by the habeas court's findings regarding the admissibility and favorability of the erroneous report or Gooden's work status. (CR – 44-45)

Gooden's testimony included her qualifications and training as well as the procedures she followed in preparing and analyzing appellant's blood samples. (CR – 36-37) Additionally, there is no evidence that the erroneous report's labeling error occurred in appellant's case. (CR – 36-37) In light of this evidence, the undisclosed evidence could not have led to a failure by the State to show that Gooden was qualified to conduct blood-alcohol analysis or that the analysis in appellant's case was performed correctly. Therefore, even if disclosed and used effectively, the undisclosed evidence could not have led to exclusion of appellant's blood-analysis results or Gooden's entire testimony. As a result, the evidence could not have made a difference between conviction and acquittal. *See Harm*, 183 S.W.3d at 408.

E. The majority's failure to consider the applicable undisclosed evidence in light of all the evidence led to an erroneous materiality finding.

An applicant is required to show that undisclosed, favorable evidence is material to guilt or punishment. *Miles*, 359 S.W.3d at 666. "Material" means that there is a reasonable probability that had the evidence been disclosed, the outcome

of the trial would have been different. *Id.* at 665. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense. *Id.* at 666. Instead, an applicant must show that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure. *Id.*

"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Miles*, 359 S.W.3d at 666 (quoting *Kyles*, 514 U.S. at 434. When evaluating whether the materiality standard is satisfied, the strength of the exculpatory evidence is balanced against the evidence supporting conviction. *Miles*, 359 S.W.3d at 666. The undisclosed evidence is considered collectively, rather than item-by-item. *Id.* Materiality depends on the circumstances of the particular case and the evidence as a whole. *Webb v. State*, 232 S.W.3d 109, 114 (Tex. Crim. App. 2007).

Sometimes, what appears to be a relatively inconsequential piece of potentially exculpatory evidence may take on added significance in light of other

evidence at trial. *Hampton v. State*, 86 S.W.3d 603, 613 (Tex. Crim. App. 2002). In such a case, a reviewing court should explain why a particular *Brady* item is especially material in light of the entire body of evidence. *Id*. This Court has noted that review of the ultimate legal conclusion of materiality is *de novo*. *See Ex parte Weinstein*, 421 S.W.3d 656, 664, 664 n.17 (Tex. Crim. App. 2014).

The majority correctly recognized that the State provided ample evidence of intoxication at appellant's trial, and that Gooden's testimony is not material to a conviction for Class B DWI. *See Diamond*, 561 S.W.3d at 298.

However, the majority went on to state that Gooden's testimony that she analyzed a sample of blood identified as appellant's and concluded that the BAC was 0.193 was necessary for the jury to make an affirmative finding on the special issue of whether appellant's BAC was 0.15 or more. *Id*. The majority then concluded that:

> [g]iven the lack of other evidence indicating appellant had a BAC of 0.15 or more, we conclude that there is a reasonable probability that the jury would have reached a different result on the Class A misdemeanor charge if Gooden's testimony had been excluded. We also conclude that if the habeas court had not excluded Gooden's testimony but allowed appellant to cross-examine Gooden with the undisclosed evidence, there similarly is a reasonable probability that the jury would have reached a different result.

Id.

Although Gooden was the only witness to testify about appellant's blood-analysis results, the majority's conclusion that the undisclosed evidence was material

is incorrect for two reasons. First, as discussed above, the conclusion does not take into account the habeas court's finding that the only undisclosed evidence at issue in this case was Gooden's certification of the erroneous report, and her temporary removal from casework to document that incident. (CR – 45) By considering in its *Brady* analysis the alleged evidence that Arnold lacked confidence in Gooden's understanding of basic science or her ability to answer basic questions, the majority failed to give the proper deference to the habeas court's findings of historical fact. *See Peterson*, 117 S.W.3d at 819.

Second, the majority failed consider in its materiality analysis the applicable undisclosed evidence in light of *all* the evidence. *See Miles*, 359 S.W.3d at 666. While the majority referenced the findings regarding Bounds's testimony, the majority did not consider any of Gooden's testimony in its materiality analysis. *Diamond*, 561 S.W.3d at 297. The only testimony from Gooden mentioned at all in the majority's opinion was the testimony "that her analysis of appellant's blood sample revealed a blood alcohol concentration (BAC) of 0.193, which is above the legal limit of 0.08." *Id.* at 292. Had the majority considered all of the evidence, including Gooden's testimony, it would have correctly found the erroneous report, and Gooden's removal from casework to document that incident, immaterial.

The habeas court's findings included that Gooden "testified regarding her qualifications, namely that she had completed two to three thousand exercises and

passed a competency test prior to engaging in blood alcohol analysis casework." (CR – 37) The findings also described Gooden's testimony that: (1) she retrieved appellant's blood samples from a cooler; (2) prior to testing appellant's blood sample, Gooden verified that the name on the blood vial labels matched the name on the sealed evidence envelope; (3) appellant's name was on the blood vial labels; (4) the instrument used to analyze appellant's blood sample was validated at the time of the analysis; (5) Gooden followed all the lab's standard operating procedures that were in place at the time of her analysis of appellant's blood; (6) Gooden used the PerkinElmer instrument in analyzing appellant's blood sample; (7) the standard operating procedures specify the use of the Agilent instrument; (8) the use of the PerkinElmer instrument was authorized in a memo; (9) the PerkinElmer memo was an addendum to the standard operating procedures; and (10) the PerkinElmer instrument was validated. (CR – 36-37)

The findings noted that Gooden testified that her analysis of appellant's blood sample revealed a blood alcohol level of .193 grams per 100 milliliters. (CR – 37) The findings also stated that Gooden testified over a period of two days, April 29 and 30, 2014, and the defense conducted a thorough cross-examination of her. (CR – 37) All of these findings are supported by the record. (RRV – 426, 428-42, 444-49, 457-65, 474-91, 499-501, 508-509, 512-619)

Without any acknowledgement of a proponent's burden under Rule 702, the majority summarily concluded that "there is a reasonable probability that the jury would have reached a different result on the Class A misdemeanor charge if Gooden's testimony had been excluded." *Diamond*, 561 S.W.3d at 298. However, in light of all the evidence, including Gooden's abovementioned testimony, there is no reasonable probability that evidence of the erroneous lab report, and Gooden's removal from casework to document that incident, would have led to exclusion of her testimony. As discussed above, the undisclosed evidence would not have led to a failure by the State to show that Gooden was a qualified expert or that appellant's blood-analysis results were reliable. *See* TEX. R. EVID. 702; *Jenkins*, 493 S.W.3d at 601-602; *Rodgers*, 205 S.W.3d at 527-28.

Nor is there any reasonable probability that the jury would have reached a different result if appellant had been allowed to cross-examine Gooden with the undisclosed evidence during trial. As discussed above, the habeas court found that Gooden testified to her qualifications, her adherence to standard operating procedures, the verified identification information on appellant's blood samples, and validation of the gas chromatograph. (CR – 36-37) Additionally, the habeas court found that the defense conducted a thorough cross-examination of Gooden. (CR – 37; RRV – 512-619) *See Webb*, 232 S.W.3d at 115 (finding that, in light of all the evidence presented against defendant and the abundant impeachment evidence

defendant offered against the complainant, the additional evidence that the complainant was considering filing a civil suit was not material under *Brady*).

Notably, had evidence of the erroneous report and Gooden's removal from casework been admitted during trial, the jury also would have heard that: (1) Gooden's procedure regarding the erroneously labeled blood was pursuant to common laboratory practice; (2) Gooden discovered the erroneous report and immediately informed her supervisors about it; (3) Gooden was not solely responsible for the mislabeled report's release—Arnold was partly responsible as well; and (4) the labeling errors that led to the erroneous report did not exist in appellant's case. (CR – 36-39) *See* TEX. R. EVID. 107 (if a party introduces part of an act, an adverse party may inquire into any other part on the same subject or introduce any other act that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent).[10] Additionally, there is no evidence that the blood specimen documented in the mislabeled report was analyzed incorrectly or that the BAC result for that sample was incorrect.

In light of all the evidence, including the entirety of Gooden's testimony, the evidence about the erroneous report, and her removal from casework to document that incident, does not make a different trial outcome reasonably probable. *See*

[10]Even if this additional evidence was not admitted to explain and clarify the circumstances surrounding Gooden's certification of the erroneous report and her removal from casework, the undisclosed evidence is still not material for the reasons discussed above.

Miles, 359 S.W.3d at 666. The dissent correctly recognized that "the likelihood of a different result is not great enough to undermine confidence in the outcome of the trial." *Diamond*, 561 S.W.3d at 304 (Donovan, J., dissenting). As a result, appellant failed to meet her burden to show there was a reasonable probability that evidence of the erroneous report, and Gooden's removal from casework to document that incident, would have led to any result other than conviction of Class A DWI.

This analysis would stay the same, even if the habeas court had found that the undisclosed evidence in appellant's case included Arnold's purported concerns about Gooden's knowledge base or her ability to answer questions. The undisclosed evidence, considered collectively and in light of all of the evidence, does not demonstrate a reasonable probability that Gooden's expert testimony would have been excluded by the trial court, or would have led to a different trial outcome. *See Miles*, 359 S.W.3d at 666 (the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense).

Therefore, even if this Court considers applicable to appellant's *Brady* claim: (1) Gooden's certification of the erroneous lab report; (2) her removal from casework; and (3) Arnold's purported concerns about her knowledge base and ability to answer basic questions, this evidence, considered in light of all of the evidence—including the entirety of Gooden's testimony—does not make the likelihood of a

different result great enough to undermine confidence in the outcome of the trial. As a result, the habeas court was within its discretion to deny appellant habeas corpus relief, and the majority of the lower court was wrong to find otherwise.

PRAYER FOR RELIEF

It is respectfully requested that the lower appellate court's majority decision be reversed.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent to the following email addresses via e-filing:

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this computer-generated document has a word count of 6,303 words, based upon the representation provided by the word processing program that was used to create the document.

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